

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1262

To be argued by
KENNETH V. HANDAL

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1262

UNITED STATES OF AMERICA,

Appellee,

—v.—

THEODORE G. DALEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of Am*

KENNETH V. HANDAL,
FRANK H. WOHL,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

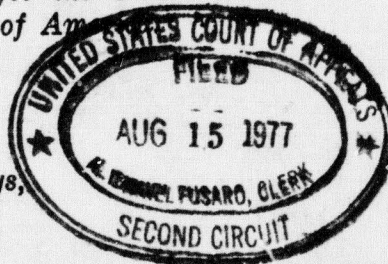




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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Theodore G. Daley appeals from a judgment of conviction entered on May 6, 1977, in the United States District Court for the Southern District of New York, after a three-week trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 76 Cr. 708 was filed on August 3, 1976, in seven counts. Count One charged Daley with conspiring with Anthony Alecca, Jr., and Thomas Clausi, not named as defendants, to obstruct commerce, by means of extortion, in violation of Title 18, United States Code, Section 1951. Count Two charged Daley with the substantive crime of extortion, in violation of Title 18, United States Code, Section 1951. Counts Three through Seven charged that Daley, a principal union officer, ac-

cepted goods and services from employers of union members, in violation of Title 29, United States Code, Section 186(b) (1) and (d).

Trial commenced before Judge Lasker on February 22, 1977. On March 10, 1977, the jury found Daley guilty on all counts. On May 6, 1977, Judge Lasker suspended imposition of sentence on Counts One through Seven and placed Daley on probation for three years. Judge Lasker fined Daley \$5,000 on each of Counts Three through Seven, totalling \$25,000.*

Statement of Facts

A. The Government's Case

1. Local 445

From 1956 to the present, Theodore G. Daley has been Secretary-Treasurer, or principal union officer, of Teamsters Local 445, a several thousand member local whose geographical jurisdiction covers Westchester, Putnam, Dutchess, Rockland, Orange, Ulster and Sullivan Counties.** (Tr. 40, 1358-60).***

* Judge Lasker ordered two special conditions of probation: that Daley submit within 90 days a plan to protect Union members from exertion of pressure or influence or solicitation upon them by the elected or appointed officers, and, in particular, the principal officer; and that in connection with the payment of the fines there be no direct or indirect solicitation, request or acceptance from any member of the Union of any sum of money or thing of value.

** It was undisputed at trial that Daley was the "boss" of the Union and that he controlled Union hiring procedures. (Tr. 39, 47, 363-64, 411-12, 442, 526, 543, 832, 1034, 1529). Daley also controlled the Union's executive board. (Tr. 180-81).

*** "Tr." refers to pages of the trial transcript. "Br." refers to appellant's brief.

2. The Labor Day Stone Hauling Operation

In the summer of 1971, Daley asked Anthony Alecca, Jr., the President, or number-two officer, of Local 445, to get him some loads of stone to make a driveway at Daley's camp in Windham, New York. (Tr. 37, 40, 73-74).^{*} Alecca contacted Thomas Turco, the operating superintendent for Hudson Cement in Kingston, New York, a Local 445 employer with which Alecca, representing the union, was then engaged in contract negotiations. (Tr. 74-80, 438, 481). Alecca told Turco he needed approximately ten loads of stone for Daley. Turco consulted his superior, Robert Greene, the General Manager of Hudson Cement, who decided that, in order to avoid any problems with Local 445, a couple of loads of stone should be provided to Daley. (Tr. 79-80, 439-40, 481-82, 487-89). Turco relayed the permission ^{**} to Alecca, who in turn relayed the information, including the source of the stone, to Daley. (Tr. 80, 85, 185, 439, 482).

On the afternoon of September 3, 1971, the Friday before the Labor Day weekend, Alecca told Thomas Clausi, the Local 445 shop steward on a project to repair the New York State Thruway near Kingston, to arrange for trucks and truckers from the Thruway project, on which between ten and fifteen Local 445 members ^{***} were then employed, to haul stone from Hudson Cement to Daley's place in Windham, about 60 miles from King-

^{*} In 1955, Daley bought a mountain cabin in Windham for approximately \$14,000. (Tr. 928, 1365-66).

^{**} In these conversations, there was no discussion as to what type of stone material was to be used. (Tr. 438, 441).

^{***} Some of these employees were drivers of trucks while others were owner-operators, members of Local 445 who owned more than one truck. The owner-operators ordinarily drove one truck and employed other Union members to drive their other trucks. (Tr. 82-84).

ston. (Tr. 81-85, 198-200, 358, 712). Alecca instructed Clausi to have two Local 445 owner-operators, Robert Kozlowski and Michael Spada bring drivers and trucks to Hudson Cement after working hours and load the trucks with stone. (Tr. 83-86, 199-201).

Alecca then told Daley that the stone would be delivered to his place in Windham that evening. (Tr. 85-86). Alecca left the office in Newburgh in mid-afternoon on September 3 to meet the trucks in Kingston and escort them to Windham. Before he arrived in Kingston, Alecca was in an automobile accident, which caused him to be hospitalized until the next day. (Tr. 86).

After speaking with Alecca, Clausi relayed the instructions to Kozlowski and Spada's son, Michael Spada, Jr., who between them rounded up between ten and fifteen ten-wheel dump trucks, each with a capacity of approximately 18 tons of stone, one tractor-trailer with a capacity of about 25 tons, and the drivers who assembled at Hudson Cement early that evening. (Tr. 201-04, 207, 209-12, 339, 405, 691-94).*

Turco, the Hudson Cement plant manager, met Clausi and the truckers at Hudson Cement. (Tr. 207-09, 441-42). Turco directed Clausi to the stockpile of three-eighths inch stone, which was then selling for \$2.50 per ton. (Tr. 207-09). The trucks and trailer loaded from the piles, with the help of a Hudson Cement employee and machine, and departed for Windham. (Tr. 212, 404-06, 442-43, 694-95).

* Among the Union members Kozlowski gathered were his brother Ron Kozlowski, Joseph Forte, and another owner-operator, Richard Bockelmann. (Tr. 336, 401-02, 692). The drivers employed by Michael Spada, Sr., who drove included Herb Sutton, Frank Qualtere, Fred Perry, Bob Snyder, Michael Spada, Jr., and Harley Williams. (Tr. 210-21, 568).

On the way to Daley's cabin, Clausi met Daley as he was driving in the opposite direction. Clausi told Daley that he had the trucks coming up with the stone and asked where the stone should be dumped. (Tr. 213-15, 698, 1415). Daley directed him to dump the stone at the back of the cabin. (Tr. 214).

All but two * of the trucks finally arrived at Daley's camp and dumped the stone as Daley had instructed. (Tr. 216-17, 219). The trucks then returned to Kingston arriving there at approximately 2:30 A.M., the operation that night having taken about eight and one-half hours. (Tr. 221, 356, 703).

At about five or six o'clock the next morning, Saturday, September 4, 1971, Daley telephoned Clausi and said that he needed more stone and ordered Clausi to "get the trucks and go down and get more stone" to fill the whole area of the driveway. When Clausi told Daley that would require twenty or thirty more loads, Daley told Clausi to get them. (Tr. 222-23). Clausi called Kozlowski and Spada and told them to have their trucks and drivers at Hudson Cement to load more stone and make another trip to Daley's cabin. (Tr. 223, 703).

Early that afternoon about fifteen or sixteen drivers reported with their trucks to Hudson Cement.** The trucks were again loaded with three-eighth's inch stone. (Tr. 224, 228, 705). When the trucks arrived in Windham, Daley, who was levelling the stone delivered the night before with a bulldozer owned by Dave Alexander,

* Two of the trucks broke down en route. (Tr. 219).

** The drivers on this trip included Bob Kozlowski, Joseph Forte, Alton Stewart, Frank Qualtere, Ron Kozlowski, Collins Becker and Frank Mayone. (Tr. 225, 410, 703, 706).

a Local 445 contractor,* showed Clausi where to have the stone dumped. (Tr. 226, 540, 708).

While at Daley's camp on September 4, Daley asked Clausi how many loads it would take to fill in an unfinished portion of the driveway. Clausi estimated that it would take seven or eight more loads, and Daley told Clausi to get them. Clausi said that it was too late to do it that day, but that the trucks would come back the next Saturday, September 11. (Tr. 229).

On Tuesday, September 7, 1971, Greene of Hudson Cement met with Alecca and told him that so much stone was being taken that the situation was becoming very embarrassing, to which Alecca replied that a few more loads were needed. Greene told Alecca he could have a few more loads but that was all. (Tr. 486).

On the evening of Friday, September 10, on instructions from Clausi, about seven or eight drivers loaded their trucks with three-eighths inch stone at Hudson Cement and parked them overnight. Early in the morning of Saturday, September 11, they drove to Daley's camp and dumped their stone in the remaining areas around the cabin. (Tr. 229-32, 708-12).

On none of the three trips, on September 3, 4, or 11, were the drivers paid for their labor—at least five hours

* This bulldozer had been delivered to Daley's cabin by other Local 445 members. (Tr. 53-55, 511-22). Alexander, who was in the business of renting construction equipment, had no record of renting this bulldozer to Daley. (Tr. 648-52). On two other occasions in 1971, Daley had sought and received pieces of heavy equipment from union contractors without payment. Those deliveries had been made by union members who were being paid for their time by the contractors. Other equipment belonging to union contractors had also been obtained in order to make all three of the deliveries. (Tr. 52-53, 62-65, 618-20, 643-45).

per driver per trip—nor were the truck owners paid for the use of their trucks or their gas—approximately 30 to 35 gallons per truck per trip at about \$.30 per gallon (Tr. 90, 239-40, 358-60, 410, 541, 571, 712-14, 784). In all, between thirty and thirty-six truck loads containing approximately 600 tons of stone were taken from Hudson Cement. (Tr. 211-12, 239, 453, 693-94).^{*} The stone was then selling for \$2.50 per ton.^{**} Hudson Cement was never paid for the stone. (Tr. 89, 453, 483, 490-91).

Clausi testified that in making the arrangements for the trucks to drive the stone he was following orders and that he did exactly what he was told to do. He believed that either he did what he was told to do or he would not work; and he had to work to support his family. Although he testified that he never pressured any of the drivers, Clausi testified that he believed that if he or the union members had refused to make the hauls, Clausi did not think they would have received work. (Tr. 238-39, 312-13). Kozlowski testified that he made the hauls to Daley's place in Windham and allowed his trucks to be used for the sake of his drivers, because he did not want them to have any difficulties with the Union over this. He believed that if he refused, some of the drivers would lose work.^{***} (Tr. 833-34).

During the deliveries of the stone, the Local 445 members who drove the trucks to Daley's cabin com-

^{*} There was some contention at trial by Daley that the material hauled in the trucks to Windham was a very fine stone material known as "screenings". Screenings consist of stone material that is from one-quarter inch in size down to dust. The price for which Hudson Cement sold screenings in 1971 was approximately \$1.50 per ton. (Tr. 436, 483-84).

^{**} The stone was then selling in Windham for approximately \$9 per ton delivered. (Tr. 1710).

^{***} In March, 1974, after the investigation had begun in this matter, Kozlowski was told by Daley that he could put Kozlowski's four trucks to work the next day but would not. (Tr. 832).

plained to Clausi about having to make the deliveries. Clausi told them that he was as unhappy about it as they were, and that the drivers should call Alecca or Daley to complain. (Tr. 238). For example, Joseph Forte, who drove stone to Daley's camp on all three occasions, was in the process of being admitted to Local 445 at the time he was told to drive the stone to Daley's cabin. He made the trips because, before the first delivery of stone, he was told by Clausi to make the delivery or not to bother coming to work on the following Monday. (Tr. 410-12).

Frank Qualtere made two deliveries because he was told by Clausi that since he was working he should make the trip to Daley's place or else he would not be working. (Tr. 568-69, 575).* Herb Sutton, a Local 445 member who was one of Spada's drivers, made one haul of stone to Daley's camp in Windham. (Tr. 779-80, 782). Sutton balked when Clausi told him to make a trip to Daley's summer home, but Clausi told him: "You will either go to the mountains or be looking for a new job." Sutton decided to go because he was afraid he would lose his job if he refused. (Tr. 781-82, 784). When he went to pick up a truck at Spada's garage, he complained to Spada about having to make the trip to the mountains for nothing. Spada told him: "You would be better off making the trip and keeping your mouth shut. At least you are working." (Tr. 782-83).** Dick Bockelmann, an owner-operator who made the September 3 trip, testified that he did so in order to insure his job. (Tr. 364).*** Alton Stewart, a Local 445 driver who had refused to go on the September 3 trip when he did not know that the

* Qualtere did not view the trip as a night out with a bunch of guys, as defense counsel suggested. (Tr. 599).

** Spada, when called as a defense witness, denied making this statement to Sutton. (Tr. 1196).

*** One of the Bockelmann's trucks was used for the trip the next day. (Tr. 357).

stone was for Daley, went on the September 4 delivery because Clausi told him that the trip was to Daley's cabin and that if he wanted a job he should make the trip. (Tr. 534-37, 543-44).

3. Delivering the Beams

Later in September, 1971, after the stone was delivered, Daley told Clausi to get him some twelve-inch by twelve-inch wooden beams similar to the beams used to form barriers on the Thruway construction job. (Tr. 87-88, 241). Clausi arranged with Eddie Hahn, another Local 445 member, to obtain some beams from the Maggiola Construction Company in Pearl River, New York. Clausi then arranged with Callanan Industries, the contractor on the Kingston Thruway job, for Kozlowski, who was then on Callanan's payroll, to pick up the beams and take them to Daley's camp in Windham. (Tr. 241-46, 715-17). Kozlowski drove from Kingston, to Pearl River, about 60 to 70 miles south, where he loaded his truck with approximately twenty to twenty-five painted beams, and hauled them back up north to Daley's Windham cabin.* (Tr. 717-26). When Kozlowski arrived at Daley's place, Daley helped him unload the timbers. (Tr. 721). Kozlowski was paid by Callanan Industries for his labor and for the use of the truck, for nine and one-half hours. (Tr. 250, 724-26).

Meanwhile, Daley told Alecca that he had spoken to Clausi about delivering some beams to his cabin and wanted to know why they had not been delivered (Tr. 87-88). After Alecca reminded Clausi about the beams, Clausi told John Callanan of Callanan Industries that

* The defense called Eddie Hahn who testified that when he had asked his employer, Maggiola, for the twelve inch by twelve inch timbers, Maggiola said that he would not provide any because they were too expensive. (Tr. 1152).

Daley wanted timbers. (Tr. 246-47). After Callanan and Alecca called Alphonse Marcelle, the President of Callanan Industries,* Callanan authorized the shipment of Callanan timbers. (Tr. 89, 246-49). About twenty-two beams then costing approximately \$34 or \$35 each were loaded, and Harley Williams, a Local 445 driver on the Callanan payroll delivered them to Daley's camp in Windham. (Tr. 248-50, 621, 636).

4. The Kingston Community

In the Kingston community, where most of the drivers lived, it was not unusual for union members who were close personal friends to help each other by lending their dump trucks** for short hauls of two or three miles. (Tr. 97-101, 318, 361-63, 524-26). Daley, however, lived in Wappingers Falls, about thirty miles from Kingston, and was not a member of the Kingston community. Nor was he personally acquainted with the drivers. (Tr. 173-74, 360-61, 411, 542, 571, 1663-64).

* According to Clausi, Callanan told Clausi to have Alecca call Marcelle, which Clausi did. When Alecca called Marcelle, Marcelle said that he wanted to verify where the beams were going and who they were for. Alecca told Marcelle that they were definitely going to Daley's cabin in Windham for Daley. Shortly thereafter, Callanan told Clausi that Alecca and Marcelle had spoken. (Tr. 88-89, 247). The defense called Matthew Fitzgerald, the Callanan Vice-President, who testified that he authorized the release of twelve-inch by twelve-inch timbers in September of 1971 because he was told they were useless, and that he was not threatened when he did so, and that it never entered his mind that he might have trouble with the Union if he did not release them. Fitzgerald knew that the beams were requested by the Local 445 shop steward on the Thruway job. (Tr. 1292-95, 1297).

** Alecca had a ravine behind his house that was partially filled by waste material trucked from the property of another Union member (who was a close friend) about a mile away, where he was building a home, and by loads of waste that had to be drawn away from the Callanan jobsite. (Tr. 97-98, 298-99, 1070-71).

B. The Defense Case

Daley testified at length. (Tr. 1347-80, 1409-1678). The substance of his testimony, apparently rejected by the jury, was that he did not request any of the material he received but that it was arranged at Alecca's suggestion. (Tr. 1377-78, 1465-68). Daley also testified that he believed all of the material to be waste material such as dirt and twigs with some stones, and that Alecca had told him that, since it was waste, there was no need to pay for it. (Tr. 1418, 1425-26, 1466). Daley also claimed that he paid Alecca \$700 or \$800 to distribute to the drivers and that it did not occur to him that the trucks belonged to Local 445 employers. (Tr. 1425-26, 1469-71, 1546-47).*

Daley denied calling Clausi on the morning of September 4, and also denied telling Clausi on September 4 that he needed more stone. (Tr. 1417). Daley denied that he had ever asked for timbers, claiming that he had expressed only a need for railroad ties which he purchased (Tr. 1369-73, 1565). According to Daley, the large beams arrived as a complete surprise and he kept them only at Alecca's request because Daley claimed, Alecca said he might want to use them. (Tr. 1374, 1565-70).

Daley also testified that he had contacted three contractors in the Windham area about installing his driveway but that none of them was available and that he could not locate another contractor in the Windham area. (Tr. 1485-88). In rebuttal, the Government established that two of the three contractors named by Daley had no recollection of his contacting them at that time and that

* During cross-examination of Alecca, Daley's counsel asked Alecca whether Daley had given him \$400 to take the drivers out to dinner. Alecca testified that this did not take place. (Tr. 194-95).

one of them did not even do driveway installations. (Tr. 1696-97, 1708-09). It was also established that the Windham area had approximately seventeen contractors who did driveway work. (Tr. 1709).

Daley further testified on cross-examination that it never occurred to him that Alecca, as President of the Union, and Clausi, as a shop steward, might suggest to people that it would help them in the Union if they worked on Daley's driveway, or that such an impression might occur to any of the drivers. Daley did not think about why the drivers were doing this work for him. (Tr. 1558-64).

Chester Davis, the current President and a business agent of Local 445, testified that in 1971, he overheard a conversation between Daley and Alecca about the trucking of material to Windham, during which discussion Daley gave Alecca money. (Tr. 965, 968-72). Raymond Ebert, now the recording secretary and a business agent of the Union, testified that although Daley was the boss of the Union he did not control which Union members worked and which did not. (Tr. 990, 1003, 1006, 1034).

Michael Spada, Sr. and Harley Williams, Spada's number-one driver, testified that they participated in the trucking operation without any fear of the consequences if they did not. (Tr. 1051, 1196). They both also testified that the material they hauled from Hudson Cement was stone and dust and mixed waste, although they had both told the Grand Jury it was stone or screenings. (Tr. 1052, 1201, 1240-42, 1247, 1764).^{*} Williams

^{*} At trial, Spada stated that he was absolutely certain the material he drove to Daley's place on September 11 consisted of waste and not stone. (Tr. 1240-41). He was then confronted with his Grand Jury testimony in which he stated that the material he and the other drivers hauled on September 11 was stone designated as 1 or 1A stone. (Tr. 1242). On his redirect examination,

[Footnote continued on following page]

also testified that the wood that he hauled to Daley's camp consisted of small odds and ends of no value where- as he had testified before the Grand Jury that the timbers were about seventeen feet long. (Tr. 1057, 1074). Two other Spada drivers testified that they were not pressured or forced to make trips. (Tr. 1110, 1128).

Daley also called nine character witnesses.

ARGUMENT

POINT I

The Evidence of Effects on Interstate Commerce Was Sufficient and the District Court Properly Charged the Jury on this Element.

Daley raises two claims with respect to the interstate commerce requirement of 18 U.S.C. § 1951, the Hobbs Act. First, Daley contends that the evidence at trial was insufficient to establish the requisite effect on interstate commerce. Second, Daley argues that the trial court erred in his instructions to the jury. Both of these claims are without merit.

A. The Requisite Showing of Interference With Interstate Commerce Was Made.

The language of the Hobbs Act makes it clear that interference or attempted interference with interstate commerce "in any way or degree" is prohibited, even if the effect is only minimal. *United States v. Tropiano*, 418

Spada stated that he had told Assistant United States Attorney Jaffe in an interview prior to the Grand Jury appearance that the material was waste. (Tr. 1278). In rebuttal for the Government, Assistant United States Attorney Joseph Jaffe testified that, during one interview and two Grand Jury appearances he had with Spada, Spada never stated that the material he hauled from Kingston to Windham was waste material. (Tr. 1747-48, 1762, 1787).

F.2d 1069, 1076 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). The effect on interstate commerce may be merely potential or subtle. *United States v. Augello*, 451 F.2d 1167, 1170 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972); *United States v. Tropiano*, *supra*, 418 F.2d at 1076-77; *Hulahan v. United States*, 214 F.2d 441, 445 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954).

The breadth of the statutory language has been recognized by the Supreme Court as invoking "all the constitutional power Congress has to punish interference with interstate commerce" *Stirone v. United States*, 361 U.S. 212, 215 (1960); *United States v. Tropiano*, *supra*, 418 F.2d at 1076-77. This concept was recently reemphasized in *United States v. Staszczuk*, 517 F.2d 53 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975), in which the Court found that the intent of Congress and the power to implement that intent required consideration in Hobbs Act cases of the consequences of the class of extortionate transactions exemplified by the conduct in issue. The Court stated:

"We hold that the commerce element of a Hobbs Act violation—the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. Congressional concern is justified by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic possibility that an extortionate transaction will have some effect on interstate commerce." 517 F.2d at 59-60 (footnote omitted).

In this case, the evidence adduced at trial satisfied the interstate commerce requirement of the Hobbs Act in several ways. First, the victims of the extortion were either workers or contractors on an interstate highway, the New York Thruway, and Daley's leverage on them and their fear which made the extortion possible consisted

of Daley's and his co-conspirators' ability to influence whether or not they would continue to work on that interstate highway.* In addition, as a general matter the victims were all engaged in the building and construction industry and ordinarily constructed facilities to serve interstate commerce. (E.g., Tr. 78, 81, 476-79, 1291-92). Construction of facilities within a state to serve interstate commerce—or, indeed, even to serve industry engaged in interstate commerce—is alone sufficient to satisfy the jurisdictional requirement of the Hobbs Act. See, e.g., *United States v. Addonizio*, 451 F.2d 49, 77 (3d Cir.), cert. denied, 405 U.S. 936 (1972); *Hulahan v. United States*, supra, 214 F.2d 445. In *Addonizio*, the Court held that extortionate conduct occurring in connection with a local construction project designed to serve industry engaged in interstate commerce constituted obstruction of interstate commerce under the Act. The Court stated, quoting from *Hulahan*, supra, 214 F.2d at 445.

“The exaction of tribute from contractors engaged in local construction work . . . who are engaged in constructing facilities to serve . . . [interstate] commerce, is, in our opinion, proscribed by the [Hobbs Act].” 451 F.2d at 772.

Another factor fulfilling the interstate commerce requirement is that the victims customarily purchased supplies and materials in interstate commerce. For example, the Local 445 truckers ordinarily purchased their trucks, parts, equipment, and gasoline in interstate commerce. (Tr. 204, 252-53, 338-39, 356, 690, 1115, 1185-86, 1201). Similarly, Hudson Cement and Callanan purchased their loading equipment and construction equipment in inter-

* See, for example, the testimony of Dick Bockelmann: Well, at the time I was working on the Thruway, and the reason I went was to insure my job. (Tr. 364).

state commerce. (Tr. 405, 617, 695). These purchases constitute effects on interstate commerce within the meaning of the Hobbs Act. See, e.g., *United States v. Augello*, *supra*, 451 F.2d 1167; *United States v. Tropiano*, *supra*, 418 F.2d 1069; *United States v. Hulahan*, *supra*, 214 F.2d 441. In *Tropiano*, this Court found the interstate commerce requirement satisfied because the victim used trucks and equipment manufactured out of state. The extortionate conduct, the Court said, had an effect on the victim's *future* orders of trucks and equipment. There was no showing that the victim was itself an interstate business.*

Daley's reliance on *United States v. Merolla*, 523 F.2d 51 (2d Cir. 1975), in connection with this aspect of the interstate commerce proof, is misplaced. *Merolla* has no application to the case at bar. In *Merolla*, the Court, while reaffirming existing law, held that the interstate commerce element of the Hobbs Act had not been proved because the local extortion had no actual or potential effect on interstate commerce. There the Court relied primarily on the fact that the victim was not engaged in an on-going contracting business but rather had entered into only one construction contract, a "one-shot deal" arising out of his "fast friendship" with one of the defendants. In addition, the Court found that the victim's only purchases of goods from out of state had been com-

* In *United States v. Augello*, *supra*, 451 F.2d 1167, the Court held that a \$100 payment by the victim drive-in restaurant may impair the efficient conduct of this business, which purchased meat in interstate commerce, sufficiently to have the requisite effect on interstate commerce.

See also *Battaglia v. United States*, 383 F.2d 303 (9th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968), in which the Court affirmed the conviction of a defendant who, through threats of violence, forced a bowling alley operator to remove a pool table which had previously traveled in interstate commerce. No other nexus to interstate commerce was alleged or proven in *Battaglia*.

pleted before the extortion began. Here, in contrast, the victim drivers, truck owners and construction companies were involved continuously with the flow of interstate goods and services before, during and after the defendant's extortion. In addition, the *Merolla* Court distinguished *Addonizio* on the ground that, as here, *Addonizio* involved construction on an interstate facility thereby affecting interstate commerce of third parties, whereas in *Merolla* the extortion affected only one of the defendant's interstate commerce which he had the right to cease entirely.

Here the proof was clear that Hudson Cement, one of the principal victims, regularly * made shipments of its products in interstate commerce. (Tr. 79, 477-79). In addition, Callanan was engaged in the construction of a highway to serve interstate commerce. (Tr. 78, 81, 199, 355, 1292). Clearly, the resources of Hudson Cement and Callanan were depleted by the extortionate scheme and the company's ability to carry on its business in interstate commerce was thereby impaired, thus satisfying the interstate commerce requirement. See, e.g., *United States v. Augello*, *supra*, 451 F.2d at 1170; *United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir.) (*en banc*), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Addonizio*, *supra*, 451 F.2d at 77.

* Hudson Cement's shipments in interstate commerce were not "small and irregular," as Daley contends. (Br. 37). See Tr. 478. In any event, under the *de minimus* interstate commerce requirement of the Hobbs Act, small and irregular shipments would be sufficient. See, e.g., *United States v. Augello*, *supra*, 451 F.2d 1167; *United States v. Mazzei*, *supra*, 521 F.2d 639; *Battaglia v. United States*, *supra*, 383 F.2d 303. Obviously, even when Hudson Cement shipped goods to New York City, (Tr. 478), it was subject to competition from non-New York stone, sand, gravel and cement dealers. Consequently, periodic tributes to Daley would affect the company's ability to compete, thereby affecting commerce within the meaning of the Hobbs Act.

Finally, proof of the interstate commerce element was fortified by the relationship of Teamsters Local 445 with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen in Washington, D.C. which routinely involved substantial interstate activities such as the monthly remissions of dues and other payments from Local 445 to the International; attendance by Local 445 members at meetings of the International; nationwide negotiations by the International; and election of officers of the International. (Tr. 40-46).

Daley's conduct takes on a significance beyond that of the particular victims involved since the Union at the time had approximately 8,000 members and contracted with various industries other than construction, such as the general freight, furniture, cement and brickyard industries. (Tr. 40, 1015). Thus, the activities of the Union membership spanned a plethora of interstate activities. Moreover, the corruption in the Union had a potential effect on Union employers involved in interstate commerce in that the desirability of engaging in work having an effect on interstate commerce in the Local 445 jurisdiction was significantly lessened by the prospects of dealing with the corrupt Local 445 hierarchy. See *United States v. Staszek*, *supra*, 517 F.2d 53.

B. The District Court's Charge on the Interstate Commerce Element Was Proper.

Daley argues that his conviction should be reversed because Judge Lasker improperly charged the jury on the interstate commerce element of the Hobbs Act: (a) by stating that the requisite effect on interstate commerce may be a potential effect; and (b) by instructing the jurors that if they believed the Government's witnesses and evidence regarding interstate commerce, then as a

matter of law the interstate commerce element was satisfied.* Daley's claims are frivolous.

First, as is clear from the discussion above, a potential effect on interstate commerce is sufficient to establish this jurisdictional element of the Hobbs Act. See, e.g., *United States v. Augello, supra*, 451 F.2d at 1170; *United States v. Tropiano, supra*, 418 F.2d at 1076-77; *United States v. Staszczuk, supra*, 517 F.2d at 59-60 ("realistic possibility" is sufficient); *Hulahan v. United States, supra*, 214 F.2d at 445.

Second, the type of charge given by Judge Lasker on the interstate commerce element of the Hobbs Act was specifically approved by this Court in *United States v. Augello, supra*, 451 F.2d at 1170. As the Court stated, quoting *Hulahan, supra*, 214 F.2d at 446:

* Judge Lasker charged the jury on interstate commerce as follows:

The second elements of the crime of extortion with which Mr. Daley is charged requires that interstate commerce be affected in some way. In this connection, I instruct you that the statutory language specifically forbids extortion which in any way or degree obstructs interstate commerce. Such extortion need affect interstate commerce only in a minimal degree to constitute a violation.

The statute is not limited to conduct that directly and immediately obstructs movement of goods, nor is it necessary that commerce actually be affected by a defendant's conduct. It is sufficient if the extortion potentially affects commerce.

Furthermore, it is not necessary for you to find that the defendant considered that the effect of his acts would be to affect interstate commerce or that he had a purpose to affect interstate commerce. All that is necessary is that the natural effect of the acts committed was either actually or potentially to affect interstate commerce.

If you believe the Government's witnesses and evidence regarding interstate commerce that has been put before you beyond a reasonable doubt, then I charge you that as a matter of law there was an effect on interstate commerce and the necessary Federal jurisdictional element is satisfied. (Tr. 2067-68).

"The charge was correct; 'it was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction.'"

Accord, Hulahan v. United States, supra, 214 F.2d at 446. Clearly, the charge here was proper. Judge Lasker, as was his duty, had decided the issue on the defense motions on two occasions and had found the requisite effect on interstate commerce established. (Tr. 955, 1823). Moreover, Daley presented no evidence contradicting the Government's evidence on interstate commerce. Therefore, the only matter properly left to the jury in this respect was the determination of the credibility of the witnesses, as Judge Lasker instructed.

POINT II

Daley's Extortionate Conduct Is Proscribed by the Hobbs Act.

Daley next contends that the extortionate conduct involved in this case is not of the type meant to be proscribed by the Hobbs Act. Specifically, Daley claims that the activity here involved was not "racketeering" and that evidence of racketeering is required for conviction under the Act. Daley's arguments are directly contrary to the plain meaning of the statute and the case law. Indeed, use of union power to exact property for personal benefit is precisely the focus of many Hobbs Act prosecutions. See, e.g., *United States v. Enmons*, 410 U.S. 396, 400 (1973); *United States v. Tolub*, 309 F.2d 286 (2d Cir. 1962); *United States v. Iozzi*, 420 F.2d 512 (4th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); and cases cited in *United States v. Brecht*, 540 F.2d 45, 51 (2d Cir. 1976), — U.S. —, 97 S. Ct. 1160 (1977). Here, besides the usual pattern of extortion of property from union

employers, Daley also extorted time and services from his own union members. This additional illegitimate interference with the activities of union members reinforces the propriety of federal jurisdiction in this case. *See, e.g., United States v. Enmons, supra*, 410 U.S. at 408; *United States v. Green*, 350 U.S. 415, 417 (1956).*

In *United States v. Brecht, supra*, 540 F.2d 45, this Court rejected Daley's contention that the Hobbs Act reaches only activities of organized crime. While recognizing that organized crime groups have often employed various types of extortion schemes, the Court upheld a Hobbs Act conviction based on a private purchasing agent's extortion of a single commercial bribe. Finding no limitation in the Act's definition of extortion that would exclude such activity, the Court stated:

"Since Congress has not limited the scope of extortion save for the statutory definition itself, we can formulate no judicial rule that would draw a practical line between one type of extortion that is covered by the Hobbs Act and another type which is not. Moreover, we cannot require, as an element of the offense, the presence of at least two individuals as evidencing the participation of organized crime, for the Hobbs Act definition of extortion is not limited to the crime of conspiracy to extort but deals with the substantive offense which can be committed by a single individual." 540 F.2d at 52.

* The defense reliance on *Enmons* is inappropriate. In *Enmons*, while reaffirming the general applicability of the Hobbs Act to extortion situations, the Court held that the Hobbs Act does not reach the use of violence to achieve legitimate union objectives, such as higher wages in return for genuine services that the employer seeks.

See also *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972); *United States v. Altese*, 532 F.2d 104 (2d Cir. 1976), *cert. denied*, — U.S. — (broad construction of racketeering statute, 18 U.S.C. § 1962).*

Finally, even if it is assumed, as Daley contends, that racketeering is necessary to bring activity within the scope of the Hobbs Act—though *Brecht* is to the contrary—Daley's activities fall within the statutory definition of racketeering. See "Racketeering activity," 18 U.S.C. § 1961(1) and (5); N.Y. Penal Law § 155.40; 29 U.S.C. § 186.

POINT III

The Evidence of Fear on the Part of the Victims of the Extortion Was Sufficient.

Daley argues that the evidence at trial was insufficient to establish a reasonable fear on the part of the victims of the extortionate conduct. Daley's attempt to reargue the evidence on this question must be rejected. See, e.g., *United States v. Sears*, 544 F.2d 585 (2d Cir. 1976). The jury was properly instructed as to the concept of fear, and Daley makes no claim otherwise. Viewing the evidence in the light most favorable to the Government, as this Court must, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Falcone*, 544 F.2d 607, 610 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1329

* Daley relies on *United States v. Yokley*, 542 F.2d 300 (6th Cir. 1976), and *United States v. Culbert*, 548 F.2d 1355 (9th Cir. 1977). Both cases are inapposite. *Yokley* was based on the armed robbery of a discount store. *Culbert* involved attempted extortion from a bank by telephoned threats of physical violence. In neither case were any illegitimate labor activities involved. Indeed, the *Yokley* court based its conclusion in part on the observation that the purpose of the Hobbs Act was to curb illegal labor activities rather than create federal criminal liability for garden variety local street crimes.

(1977), the jury could fairly conclude that the victims complied with Daley's demands out of reasonable fear of economic or financial injury. See, e.g., *United States v. Rastelli*, 551 F.2d 902 (2d Cir. 1977).

The Government's evidence at trial showed that several Local 445 truck drivers and owners provided their services to Daley because of their fears about their job security. As Herb Sutton, a Local 445 driver, put it: "I was afraid if I didn't go I would lose my work. I needed the job." (Tr. 784). Joe Forte, who was in the process of being admitted to Local 445, testified that he was afraid he would lose his job if he did not make the trip. (Tr. 543-44). Dick Bockelmann testified that he went to insure his job. (Tr. 364). Similarly, representatives of Hudson Cement testified that the stone was provided out of fear of harm to their business if they rejected the request. (Tr. 442, 450-52, 487-89). There was also evidence from which the jury could conclude that the timbers were provided by Callanan Industries for the same reason.* Daley's claim, that the jury was not justified in concluding that the victims' fear was reasonable, is frivolous. The record was replete with evidence of Daley's control over which Local 445 members worked (Tr. 268, 326, 321, 572-75, 676); which owner operators were engaged on construction sites (Tr. 364, 727, 832, 862-67, 892-97, 903-14); and whether employers' operations would continue without interference from the union, (Tr. 325-26, 460-63, 472, 486-89, 613-20, 716-21, 836-40). Daley's position and power in the union is evidence from which the jury was entitled to infer reasonable fear. See *United States v. Tolub*, 309 F.2d 286, 289 (2d Cir.

* Alecca testified that the President of Callanan Industries would release the timbers only after confirming that they were for Daley. (Tr. 88-89, 247).

1962);* *United States v. DeMet*, 486 F.2d 816, 820 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).** The jury was clearly entitled to reject Daley's suggested alternative motives for the victims' actions, such as the friendly custom in the Kingston area.

* It is of no consequence that certain victims testified for the defense that they were not concerned about job or financial security in providing that goods and services. The Government was not required to prove that all the victims were placed in fear. Moreover, when there is conflicting evidence, it is not for this Court to substitute its own view of the evidence for that of the jury. *United States v. Sears*, *supra*, 544 F.2d at 586; *United States v. Bonacorsa*, 528 F.2d 1218, 1221 (2d Cir.), *cert. denied*, 426 U.S. 935 (1976).

** That Daley may have personally threatened no one is irrelevant since the exploitation by Daley through Alecca and Clausi of his victims' reasonable fears—even without threats—constitutes extortion. *See, e.g., United States v. Crowley*, 504 F.2d 992, 996 (7th Cir. 1974); *Callanan v. United States*, 223 F.2d 171, 174-76 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955). Moreover, Daley's conspiratorial and agency relationships with Alecca and Clausi makes Daley responsible for the conduct of Alecca and Clausi in carrying out Daley's orders. (*See Point IV*, pages 25-29, *infra*).

The evidence was clear that the events set in motion by Daley did not occur as a result of customary generosity. The custom in the community did not include jobs of the type and the magnitude of those done for Daley. (Tr. 97-101, 318, 361-63, 411, 487, 524-26). In addition, the jury was also free to infer that some of the incidents relied on by the defense, such as Hudson Cement's decision to furnish stone for a union parking lot, represented nothing more than other examples of extortion by Daley. (Tr. 460-63, 472, 836-40).

POINT IV

The Evidence of Daley's Participation in the Conspiracy and Consequent Responsibility for the Acts of Alecca and Clausi Was Sufficient.

In light of the overwhelming proof of Daley's participation in the conspiracy, Daley's tardy objection to the unspecified conversations of Alecca and Clausi, as well as his claim that the evidence was insufficient to submit the conspiracy count to the jury, must be rejected. The evidence of Daley's participation in the conspiracy permeates the record here, compelling the conclusions that Judge Lasker was correct in admitting the challenged evidence and submitting the conspiracy count to the jury.* Daley was the only beneficiary of the extortion scheme since only he received a driveway. He was aware of all three deliveries of stone to Windham immediately prior to their being made and was present during the September 4 deliveries. (Tr. 85, 185, 222-23, 226, 229, 540, 708). He was also present when Kozlowski delivered timbers there. (Tr. 721). In addition, Alecca and Clausi testified

* The two legal standards to be applied to the evidentiary and sufficiency issues are similar but distinct. Admission of the co-conspirators' or agents' statements under Fed. R. Evid. 801(d)(2)(D) or (E) requires a showing of Daley's participation in the conspiracy by a fair preponderance of the evidence independent of the hearsay utterances. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Submission of the conspiracy count to the jury requires that the government's proof satisfy the higher standard set forth in *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972): whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

See *United States v. Stanchich*, 550 F.2d 1294, 1299 (2d Cir. 1977). Judge Lasker recognized this distinction in making his rulings on the defendant's motion at the end of the Government's case, (Tr. 955), and again after the defense rested. (Tr. 1823).

to numerous direct conversations with Daley about every stage of the plan to obtain the driveway and other benefits for him. (Tr. 73-74, 85-86, 87-88, 185, 213-15, 222-23, 226, 229, 241, 698, 1415). Indeed, the Government's evidence clearly showed that Daley directly requested each delivery of stone or timbers and had numerous conversations with Alecca and Clausi about various aspects of the arrangements, including where the stone was coming from. After such clear and direct evidence of Daley's designation of Alecca and Calusi as his agents in this scheme, for the District Court to exclude the co-conspirators' statements made exclusively for Daley's benefit or fail to submit the conspiracy count to the jury would indeed require "a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977).^{*} Clausi's and Alecca's conversations in furtherance of the driveway and timber projects were clearly admissible against Daley either as co-conspirators' statements under Fed. R. Evid. 801(d)(2)(E)—see also *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970)—or as statements of Daley's agents under Fed. R. Evid. 801(d)(2)(D); and the proof of the conspiracy satisfied the standard for submission to the jury, *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972).

Daley argues here, as he did to the District Court and jury, that Daley did not personally approach any truckers or employers, and that Alecca and Clausi did not testify

^{*} Proof of similar acts, prior to the deliveries of equipment and services to Daley, constituted more non-hearsay evidence showing both Daley's participation in the conspiracy and his guilty knowledge and intent. See *Fed. R. Evid.* 404(b); *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Campanile*, 516 F.2d 288, 292 (2d Cir. 1975); *United States v. Drummond*, 511 F.2d 1049, 1055 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975); *United States v. Kaufman*, 453 F.2d 306, 310 (2d Cir. 1971).

to any conversation with Daley in which the details of their many discussions with the truckers or employers were rehearsed. Independent proof that Daley was aware of every minute detail of the criminal enterprise is unnecessary in light of the clear showing from Daley's own conversations and acts of his knowing participation in the conspiracy. See *United States v. Stanchich*, *supra*, 550 F.2d at 1300; *Blumenthal v. United States*, 332 U.S. 539, 557 (1947); *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047, 405 U.S. 928 (1972). Here the circumstances—these requests to union members and employers, with whom Daley had no personal acquaintance, were coming from the two highest officers in the Local plus the shop steward for whom many of the truckers worked—made the extortionate pressure obvious.* To argue, as Daley does, that there was no evidence of his participation in the conspiracy is simply to ignore that the trial judge has the right to draw justifiable inferences of fact, see *United States v. Taylor*, *supra*, 464 F.2d at 243; *United States v. Calabro*, *supra*, 449 F.2d 885; and that the "pieces of evidence must be viewed not in isolation but in conjunction," *United States v. Geaney*, *supra*, 417 F.2d at 1121. Consideration might appropriately have been given, for example, to Daley's considerable experience in the building and construction field, to his familiarity with the different kinds of stone, and to his long-time position as boss of Local 445. (Tr. 1349-50, 1356-57, 1529, 1540-41). The District Court and jury were entitled to reject Daley's claims that he thought that these goods and services were gifts, that he paid Alecca money to distribute

* Under the Hobbs Act, it need not be proven that the "defendant actually created the fear in the minds of his victims. Rather, . . . the exploitation of the victim's reasonable fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear and despite the absence of any direct threats." *United States v. Crowley*, 504 F.2d 992, 996 (7th Cir. 1974); *Callanan v. United States*, 223 F.2d 171, 174-76 (8th Cir.), *cert. denied*, 350 U.S. 862 (1955).

to the drivers, and that it never occurred to him that the truckers might have felt pressure to comply with Alecca's and Clausi's requests on his behalf. (Tr. 1425-26, 1545-47, 1558-60, 1563-64).

Daley's evidentiary claim is without merit for the additional reason that he failed to raise it in the District Court.* Accordingly, Daley waived any right to raise this issue on appeal. See *United States v. Domenech*, 476 F.2d 1229, 1232 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973); *Messina v. United States*, 388 F.2d 393, 395 (2d Cir.), *cert. denied*, 390 U.S. 1026 (1968); *United States v. Indiviglio*, 352 F.2d 276, 279-280 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Finally, Daley's failure, even in this Court, to specify exactly what conversations he claims should not have

* When Alecca, Clausi and the other parties to conversations with them testified, Daley never objected to the testimony as to the statements of Alecca and Clausi. In fact, defense counsel implied the contrary when he objected to statements of other persons because the witness was unable to recall whether they had been made by a co-conspirator. Defense counsel specifically stated that he was not objecting to statements of persons who came within the "permissible category" of co-conspirators. (Tr. 337, 352-53). Daley did make some objections to statements of the victims to Alecca and Clausi. These objections were sometimes sustained. (Tr. 93, 208-09, 242, 704). The Court once admitted over objection testimony concerning what the drivers said to Clausi about their attitude towards driving to Daley's camp. (Tr. 235). This testimony was admissible since persons may testify to a victim's statements that indicate his fear. *E.g.*, *United States v. Palmiotti*, 254 F.2d 491, 497 (2d Cir. 1958); *United States v. Kennedy*, 291 F.2d 457, 458 (2d Cir. 1961); *United States v. Hyde*, 448 F.2d 815, 845 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); *United States v. Biondo*, 483 F.2d 635, 643 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974); *Fed. R. Evid.* 803; *Wigmore, Evidence* § 1789 (1940). Moreover, even in arguing his motion at the end of the Government's case, defense counsel adverted to the evidentiary question only in the context of arguing the insufficiency of the evidence, and not the admissibility of the statements of Alecca and Clausi. (Tr. 928-37).

been admitted precludes any analysis of whether the evidence was admissible on another basis besides Fed. R. Evid. 801(d)(2)* and whether any error, if there was error, prejudiced Daley.**

POINT V

The District Court Properly Denied Daley's Motion for Recusal.

Daley next argues that Judge Lasker should have recused himself for the reason that, when in 1970 he presided over a civil action concerning a claim of an unfair labor practice against Local 445, Judge Lasker appeared to find that Daley or Raymond Ebert, both of whom testified in the civil case and again as defense

* Many of Alecca's and Clausi's conversations were not hearsay because they did not consist of "statements" offered to establish their truth, *Fed. R. Evid.* 801(c), but instead consisted of instructions concerning how the materials were to be delivered. Many statements were also independently admissible to show what Alecca and Clausi did as a result of their instructions from Daley and also to show the victims' motivation for providing the goods and services. See *Anderson v. United States*, 417 U.S. 211, 219-20 (1974); *United States v. Scandifia*, 330 F.2d 244, 251 n.8 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); *Sawyer v. Barczak*, 229 F.2d 805, 809 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956), *United States v. Sheehan*, 428 F.2d 67 (8th Cir.), *cert. denied*, 400 U.S. 853 (1970); *Fuller v. Dilbert*, 244 F. Supp. 196, 213 n.21 (S.D.N.Y.) *aff'd*, 358 F.2d 305 (2d Cir. 1965).

** The primary justification for the exclusion of hearsay—the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence—is inapplicable here since Alecca and Clausi testified and were cross-examined. See *Anderson v. United States*, *supra*, 417 U.S. at 220. Thus, this situation is unlike the ordinary *Geany* situation in which the statement of the co-conspirator sought to be introduced against the defendant is offered through a witness other than the declarant who never appears as a witness.

witnesses in the trial below, were not testifying truthfully.* Judge Lasker, upon being apprised of the prior proceeding, said that he had only a "very vague recollection" of the case (Tr. 1090-91), and denied Daley's recusal motion on the grounds that it was not timely and that his having presided over the prior proceeding did not constitute "personal bias or prejudice" as required by the recusal statute, 28 U.S.C. § 455. (Tr. 1270-72).**

Both grounds relied on by Judge Lasker in denying Daley's motion were correct. Daley's application, ten days after the commencement of trial, after the Government had rested its direct case, and almost seven months after the case had been assigned to Judge Lasker, (Tr. 1089-94), was clearly untimely. See 28 U.S.C. § 144; *Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation*, 507 F.2d 1281, 1286 (8th Cir. 1974). Daley offered no justification for the delay. His appearance before Judge Lasker and Judge Lasker's comments were matters of public record personally known to Daley and to Local 445's civil attorneys, who repre-

* In the civil proceeding, *Vincent v. Local 445*, 70 Civ. 4741 (S.D.N.Y. 1970), Judge Lasker stated at the close of the hearing that he would consider referring the matter to the United States Attorney because it was impossible to reconcile the testimony "without finding somebody is perjuring himself." (Tr. 1092). Subsequently, Judge Lasker decided the civil case against Local 445. Daley and Ebert were the only witnesses for Local 445 in that matter. (Tr. 1090).

** The relevant provisions of 28 U.S.C. § 455 read:

- (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

sented the union in the civil case and assisted Daley below in this case. (Tr. 1092). It is precisely this type of sampling of the tenor of the Court and jury before deciding whether to file a recusal motion that the time requirement of Section 144 seeks to prevent. *Peckham v. Ronrico Corp.*, 288 F.2d 841 (1st Cir. 1961); *Bradley v. School Board of City of Richmond*, 324 F. Supp. 439, 443 (E.D. Va. 1971).

Daley's argument that the motion was not untimely because his trial counsel allegedly lacked actual knowledge of the prior proceeding is entirely without merit. See *Satterfield v. Edenton-Chowan Board of Education*, 530 F.2d 567, 574 (4th Cir. 1975); *Hirschkop v. Virginia State Bar Association*, 406 F. Supp. 721 (E.D. Va. 1975). The critical factor is not the point at which the defense counsel became aware of the asserted bias; but when Daley became aware of his claim. Daley's failure to inform his counsel of the prior proceeding provides no excuse. See *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 516 (4th Cir. 1974); *Hirschkop v. Virginia State Bar Association*, *supra*, 406 F. Supp. 721; *Bradley v. School Bd. of City of Richmond*, *supra*, 324 F. Supp. at 443. Certainly this matter was ascertainable by Daley's trial counsel. See *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Hirschkop v. Virginia State Bar Association*, *supra*, 406 F. Supp. at 724; *In re United Shoe Machinery Corp.*, 276 F.2d 77 (1st Cir. 1960).*

Even on its merits Daley's claim should be denied because the bias and prejudice charged by Daley arise

* In addition, Daley's counsel failed to file a certificate that Daley's affidavit was filed in good faith, though counsel did file an affidavit. The absence of the required certificate is in itself a significant defect. *Walters v. United States*, 404 F. Supp. 996, 998 (S.D.N.Y. 1975), *aff'd*, 542 F.2d 1166 (2d Cir. 1976); *Ormento v. United States*, 328 F. Supp. 246, 260-51 (S.D.N.Y. 1971).

exclusively from Judge Lasker's participation in prior judicial proceedings and are therefore not "personal" as §§ 144 and 455 require. This Court has recently, and exhaustively, examined the provisions and legislative history of 28 U.S.C. §§ 144 and 455 and the decisions interpreting them in *United States v. Wolfson*, Dkt. No. 76-1393, slip op. 4021 (2d Cir. June 3, 1977). As the Court noted, both Section 144 and Section 455 speak in terms of "personal" bias. The Court observed that "for an alleged bias to be 'personal,' it 'must stem from an extrajudicial source . . .'" slip op. at 4027, and cases cited therein. See also *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S.Ct. 523 (1977).*

POINT VI

The Prosecutor's Summation Contained No Improper Argument.

Daley complains of the following portion of the prosecutor's summation:

So, ladies and gentlemen, it is clear to you as you start to look at this case that Mr. Daley certainly received something of substantial value, that if you ladies and gentlemen had a house of that sort and decided that you needed a driveway and you went out to hire somebody to get that driveway

* Daley's claim that Judge Lasker was required to refer the recusal application to another District Judge (Br. at 59) is based on an incorrect reading of 28 U.S.C. § 144. It is for the judge who is the object of the affidavit to pass on its sufficiency. See, e.g., *United States v. Torbert*, 496 F.2d 154, 156-57 (9th Cir.), *cert. denied*, 419 U.S. 857 (1974); *Grimes v. United States*, 396 F.2d 331 (9th Cir. 1968); *Bumpus v. Uniroyal Tire Co.*, 385 F. Supp. 711, 712 (E.D. Pa. 1974); *Deal v. Warner*, 369 F. Supp. 174, 176 (W.D. Mo. 1973).

put in, it would cost you a substantial amount of money in order to get that driveway put in.

There is no doubt about that, and you, ladies and gentlemen, certainly don't get a driveway of this sort in the manner that Mr. Daley did. (Tr. 1857).

This statement, made in the course of a discussion of the evidence concerning the various things of value that Daley received, constituted an entirely proper response to Daley's contention throughout the trial, and repeated in the defense summation, that the driveway was built out of friendship for Daley. (Tr. 102, 750-51, 997-99, 1110, 1128, 1196-97, 12002, 1425-26, 1944-45, 1953, 1958). These comments also proved to be an accurate anticipation of defense counsel's theme in summation that the materials Daley received had no value. (Tr. 1966, 1992). In these remarks, the prosecutor, as he was fully entitled to do, merely argued to the jurors that they should use their common sense and their own knowledge of everyday affairs * in determining whether Daley received goods and services of value, and in considering the motivation of Daley's victims and Daley's power over them.** In sum, the prosecutor's statements were wholly proper and Daley's attack, wholly devoid of legal authority, is without merit.***

See, for example, Judge Lasker's charge on credibility:
Perhaps the best answer is to say that you determine the truthfulness or accuracy or weight to be given to a witness' testimony in the same way that you determine questions in your own personal lives. (Tr. 2042).

See also Judge Lasker's charge on reasonable doubt. (Tr. 2040-41).

** Indeed, defense counsel in his summation, in arguing that the materials received by Daley lacked value, admonished the jury: "Use your own common sense." (Tr. 1967).

*** The cases cited by Daley are entirely inapposite. *Berger v. United States*, 295 U.S. 78 (1935), extensively quoted by Daley, involved conduct throughout the trial by the prosecutor

[Footnote continued on following page]

POINT VII

The Grand Jury Procedure Was Proper.

Daley's final argument seeks *in camera* inspection by the Court of the Grand Jury minutes. This argument is frivolous. In 1976, the indicting Grand Jury heard the testimony of one witness and also received transcripts of testimony of witnesses who had appeared before another Grand Jury in 1973. (Tr. 1799).^{*} Without alleging any basis to suspect irregularity in the Grand Jury proceedings, Daley claims that *in camera* inspection of the Grand Jury minutes is necessary to insure: (1) that the reading of the prior 1973 testimony was both accurate and complete and that a transcribed record of the reading was made; (2) that all comments and colloquy between the prosecutor's office and the grand jurors was recorded; and (3) that legal instructions to the Grand Jurors conformed to the law and were fair. In this context, Daley expresses concern about the Grand Jury's receipt in 1976 of the 1973 Grand Jury testimony.

The short answer to these claims is that they have been waived, since Daley did not raise them before trial as required by Rule 12(b)(2) of the Federal Rules of

that was "thoroughly indecorous and improper," including personally injecting himself into the case. *Id.* at 84. In *United States v. White*, 486 F.2d 204 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), the prosecutor summed up in a two-day trial charging twice that the defendant was "lying" and repeatedly indicating that the defense was fabricated. The Court termed the comments "ill-conceived" but affirmed the conviction, noting that the remarks might not have aroused the Court's concern in a long and hotly contested trial. In *United States v. Burgos*, 304 F.2d 177 (2d Cir. 1962), the prosecutor suggested that, because narcotics were found in a child's dresser, the defendant was unconcerned about the safety of his own children.

^{*} No indictment was presented to the 1973 Grand Jury. (Tr. 1801).

Criminal Procedure, but chose to delay raising this claim until the end of the Government's direct case. *United States v. McGrath*, Dkt. No. 77-1064, slip op. 4827, at 4831-32 (2d Cir. July 19, 1977); *United States v. Blitz*, 533 F.2d 1329, 1344 (2d Cir.), *cert. denied*, — U.S. — 97 S. Ct. 65 (1976); *United States v. Kahn*, 472 F.2d 272, 283 n.9 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

Moreover, the claims themselves are meritless. The procedure followed here was approved by this Court in *United States v. Blitz*, *supra*, 533 F.2d at 1344, quoting from the Supreme Court, that "an indictment valid on its face is not subject to challenge on the ground that the Grand Jury acted on the basis of inadequate or incompetent evidence. . . ." *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Costello v. United States*, 350 U.S. 359, 363 (1956). See also *United States v. Wyler*, 487 F.2d 170 (2d Cir. 1973). Here there is no chance that the Grand Jurors were misled as to the quality of the evidence they were receiving, *cf. United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), since it was obvious to the Grand Jurors that transcripts were being read to them. In addition, the Grand Jurors were explicitly warned by the Assistant United States Attorney that they were entitled, if they wished, to hear the testimony first-hand from the live witnesses. (Tr. 1880). See also *United States v. Blitz*, *supra*, 533 F.2d at 1344; *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973).

Daley's various alleged justifications for the Court's inspection of the Grand Jury minutes do not withstand analysis. The court's examination of the minutes to determine that all the 1973 transcripts were given to the 1976 Grand Jury would be pointless because Daley has no right to insist that all witnesses appear before the Grand Jury.* See *United States v. Eucker*, 532 F.2d 249,

* Daley makes no reference to any witness who wished to appear before the Grand Jury but was not allowed to.

256 (2d Cir. 1976), — U.S. —, 97 S.Ct. 747 (1977); *United States v. Koska*, 443 F.2d 1167, 1169 (2d Cir.), *cert. denied*, 404 U.S. 852 (1971); *United States v. Del Toro*, 513 F.2d 656, 666 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975). Similarly, Daley's request for an assurance that a transcription was made of all of the 1976 Grand Jury proceedings, consisting primarily of the reading of prior testimony, is without substance because the failure to record proceedings before the Grand Jury—whether the proceedings consist of the testimony of witnesses, reading of exhibits or statements by the prosecutor—is not a ground for setting aside a verdict or voiding an indictment. *United States v. Peden*, 472 F.2d 583 (2d Cir. 1973); *United States v. Messitte*, 324 F. Supp. 334 (S.D.N.Y. 1971).

Daley's third reason for requesting *in camera* inspection of the Grand Jury minutes—to insure that proper legal instructions were given to the Grand Jurors—fails because Daley offers no reason to believe that any abuse occurred. His argument is wholly insufficient to overcome the presumption of regularity of Grand Jury proceedings. See *United States v. Peden*, *supra*, 472 F.2d at 584 n.4; *United States v. Messitte*, *supra*, 324 F. Supp. at 337. See also *United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

KENNETH V. HANDAL,
FRANK H. WOHL,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

KENNETH V. HANDAL being duly sworn deposes
and says that he is employed in the office of the United States
Attorney for the Southern District of New York.

That on the 15th day of August, 1977
he served ~~a copy~~ ^{copies} of the within brief by placing the same in a
properly postpaid franked envelope addressed:

GUSTAVE H. NEWMAN, ESQ.
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NEW YORK, NEW YORK

And deponent further says that he sealed the said envelope and
placed the same in the mail box for mailing at the United States
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City of New York.

Kenneth V. Handal

Sworn to before me this

15th day of August, 1977
Phyllis G. Rush

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4635198
Qualified in Bronx County
Commission Expires March 30, 1978